

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 93B129

EEOC Charge No. 32A930475

CCRD Charge No. S93DR021

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

AHMAD BODAGHI,

Complainant,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Hearing commenced on May 19, 1994 and concluded on July 21, 1994 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by David F. Steinhoff, Assistant Attorney General. Complainant appeared in person and was represented by James R. Gilsdorf, Attorney at Law.

Respondent's witnesses were: Max Vezzani, Staff Director, Board of Land Commissioners; John W. Wilkes III, State Land Board Commissioner; John Brejcha, Surface Section Manager; Mark W. Davis, Minerals Director; Scott W. Price, Urban Lands District Manager; Dennis DeVore, Rights of Way Manager; and Cindy Horiuchi, Human Resources Manager, Department of Natural Resources.

Complainant testified in his own behalf and called the following other witnesses: Judith A. Hill, former Senior Secretary, State Land Board; William J. Killip, Special Projects Manager; Ellen Scriven, Accounting Technician III; and Larnad A. Waterman, former Director of Urban Lands, State Land Board.

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Respondent's Exhibits 1 through 27 and Complainant's Exhibits A through I were admitted into evidence by stipulation of the parties.

At Complainant's request, the witnesses were sequestered except for Complainant and Max Vezzani, Respondent's advisory witness.

MATTER APPEALED

Complainant appeals his non-selection to the reallocated position of Program Administrator I resulting in the abolishment of his position and consequent layoff.

ISSUES

This case was originally postured as an appeal of a layoff due to reallocation of duties. However, based upon the evidence as presented, Complainant does not contest the reallocation or the layoff, but rather is appealing his non-selection to the newly created position. (Respondent agrees that this is an issue.) Therefore, the only question for resolution is whether Complainant was discriminated against in the selection process, not whether the layoff itself was arbitrary or capricious. The issues are:

1. Whether Complainant proved by a preponderance of the evidence that he was discriminated against on the basis of national origin when he was not selected to fill the position of Program Administrator I;
2. Whether either party is entitled to an award of attorney fees.

FINDINGS OF FACT

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1. Complainant, Ahmad Bodaghi, is an Iranian-born U.S. citizen. As such, he is a member of a protected class (national origin).

2. Bodaghi earned a degree in civil engineering from the University of Colorado in 1979. He began his state employment as a temporary (six months) Highway Engineer A with the Department of Highways in 1983. On May 16, 1984, Bodaghi became employed by Respondent Department of Natural Resources (DNR) as an Engineer A with the State Land Board and was subsequently promoted or upgraded to Engineer B, Engineer C, Engineering Technician I and Engineering/Physical Sciences Technician II, respectively. Bodaghi remained employed by the Land Board until his position was abolished effective April 30, 1993, due to a reallocation.

3. The State Land Board is responsible for the management of lands that are conveyed to the state by the federal government and which generate revenues for state education. As the staff engineer for rights-of-way, Bodaghi was in charge of rights-of-way and similar leases for tower sites and water wells and special use permits for access roads on all state trust lands in Colorado. Under Bodaghi's management, state revenues increased from \$69,000 to \$400,000 annually.

4. Max Vezzani became Staff Director for the Board of Land Commissioners in September of 1990 and is the appointing authority for the Land Board. The State Land Board has three full-time commissioners.

5. Bodaghi was an Engineering Technician I at the time of Vezzani's arrival. Vezzani began adding duties to Bodaghi's position, which Bodaghi took in stride and performed well. At Vezzani's suggestion, a desk audit was performed on Bodaghi's position which resulted in a reallocation upward to Engineering Technician II. Bodaghi was then selected to fill the reallocated position at Grade 87.

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6. Bodaghi was named State Land Board Employee of the Year in 1991.
7. Bodaghi continued to assume additional duties and responsibilities and requested another desk audit.
8. Bodaghi wrote a PC-8 describing the actual duties of his position. This job description was reviewed and approved by his supervisor, John Brejcha, and by Max Vezzani, the appointing authority, on August 20, 1992 and represented an accurate reflection of Badaghi's duties. (Respondent's Exhibit 2.) An audit of these duties resulted in another reallocation of the position. The position was unique within the Land Board.
9. On January 29, 1993, Bodaghi's position was reallocated from its current class of Engineering/Physical Sciences Technician II, Grade 87, to Program Administrator I, Grade 95, described by Vezzani as a "dramatic" upgrade of twenty per cent. (Respondent's Exhibit 3.) Bodaghi was advised in writing by Kim Burgess, DNR Personnel Analyst, that there would not be an examination process if there were fewer than four qualified applicants for the reclassified position, in which event Bodaghi's name would be placed on an eligible list as qualified and an appointment could be made from that list. (Respondent's Exhibit 4.)
10. A "Notice of Proposed Reallocation and Position Examination" was released on January 29, 1993, limiting applicants to employees of the Department of Natural Resources. (Respondent's Exhibit 5.)
11. Upon reallocation, Bodaghi's rights-of-way position became equivalent to the position of Minerals Director, a management level position.
12. In addition to the normal job announcement, Vezzani sent a memo to all staff members on February 1, 1993 encouraging applications for the position and inviting phone calls from anyone with questions about the job duties or the application process. (Respondent's Exhibit 6.) At a staff meeting, Vezzani

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urged anyone interested to apply even if they didn't feel fully qualified. This was unusual in the case of a reallocation announcement where there was an incumbent. Past practice had been to simply post the announcement on the bulletin board and perhaps through E-Mail.

13. Bodaghi became concerned at the open solicitations for applicants for his position because the historical practice of the Land Board, continued by Vezzani, was to automatically select a satisfactorily performing incumbent to fill a reclassified position where there were fewer than four applicants. He discussed his concern with Vezzani, who told him to try to be among the top three if a test were given.

14. Prior to the second reallocation of Complainant's position, three positions were upgraded under Vezzani where there was more than one applicant and in each case the incumbent was selected without the benefit of an examination or interview process, namely:

a) John Brejcha laterally transferred to the Land Board from the Division of Parks and Wildlife, having worked with Vezzani at the latter agency. In July of 1992, Brejcha's position was reallocated from Program Administrator I to Program Administrator II, a twenty per cent upgrade. Brejcha and someone named Callahan were referred from the eligible list. Brejcha was selected for the reallocated position without the benefit of an examination or interview process. Vezzani had already determined that Brejcha was the best candidate and decided to not conduct interviews.

b) Like Brejcha, Margaret Gobel worked with Vezzani at the Division of Parks and Wildlife and laterally transferred to the Land Board as a Staff Assistant I in July of 1991. This was a recently vacated position which, upon the retirement of the incumbent, had been reallocated downward from Staff Assistant II to Staff Assistant I. Following the transfer of Gobel, the position was reallocated in 1992 to its original classification of Staff Assistant II. Judith Hill, a Senior Secretary who had been with the Land Board

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since 1981, applied for the position, but Gobel, as the incumbent, was selected without an examination or interview process being implemented. Vezzani saw no need to convene an interview panel because of his belief that, although both applicants were qualified, Gobel was the more qualified.

c) Fran Kulas laterally transferred into a Senior Secretary position made vacant by a retirement. The position was then upgraded to Staff Assistant I. Judith Hill applied for this reallocated position but was not interviewed. An examination was not necessary because there were fewer than four applicants. Even though both applicants were qualified, Vezzani did not institute an examination or interview process because, "this was a fairly low level job", Kulas was the more qualified and she was the incumbent. Hill was not surprised at Vezzani's procedure (or lack thereof) because, historically, the incumbent was always selected for a reallocated position.

15. Vezzani's stated reasons for formalizing selection procedures with respect to Bodaghi's reallocated position were that it was a "high level" position, the commissioners had advised him generally to seek the best qualified applicants when filling vacancies, and other employees wanted a more open hiring process.

16. On January 29, 1993, the same date that Complainant's position was reallocated, Scott Price's position was reallocated from Land Agent, Grade 84, to Program Administrator I, Grade 95. (Respondent's Exhibits 27.1 and 27.3.) On February 4, 1993, three days after sending a memo to all staff members encouraging them to apply for Bodaghi's position, Vezzani circulated a similar memo regarding the reallocation of Scott Price's position. (Respondent's Exhibit 27.8.) Unlike the Bodaghi memo, the Price memo did not contain the introductory paragraph, as follows: "In order to better keep everyone informed of personnel actions I have decided to personally circulate notices of this nature as a matter of course. Therefore in the future whenever any of these type actions come through I will circulate copies to the Land Board staff." Also unlike the Bodaghi memo, the Price memo did not include the sentence,

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"However, the immediate decision for you is whether or not you wish to apply for the position." (Respondent's Exhibit 6.)

17. Scott Price was unhappy that his job had been opened up to competition upon reallocation. However, the only other applicant for the position withdrew, whereupon Price was appointed, and a competitive process was not implemented.

18. There were three applicants for Bodaghi's reallocated position, namely: a) Complainant Ahmad Bodaghi; b) Dennis DeVore, Minerals Manager in Greeley; c) Robert Clift, District Manager in Pueblo.

19. The hiring process designed by Vezzani comprised three parts: a) each of the three applicants was required to prepare and submit briefing papers on two issues; b) a two-hour written exam consisting of 24 questions was given; c) a one-hour interview of each applicant was conducted by a panel selected by Vezzani. (Respondent's Exhibit 7, 8 and 9.)

20. The four members of the hiring panel were: John Brejcha, Surface Sections Manager; Mark Davis, Minerals Director; John Wilkes, Land Board Commissioner; and Vezzani.

21. In his assessment of the briefing papers, Vezzani found that all three applicants provided adequate and creative responses but that DeVore was superior in terms of clear communication and writing ability. Vezzani ranked the applicants on this part of the selection criteria in the following order: 1) DeVore; 2) Bodaghi; 3) Clift. (Respondent's Exhibit 17.) Vezzani ranked the candidates in the same order on the oral interview and on the written questions and answers. (Respondent's Exhibit 17.2.)

22. John Brejcha ranked DeVore first, Bodaghi second and Clift third on the briefing papers and written questions but placed Bodaghi last on the oral

interview. Brejcha's overall ranking was DeVore, Bodaghi, then Clift. Brejcha's recommendation was, "To offer the position to Dennis [DeVore] to utilize his skills in this position. Then in the future, to expand this position's duties and responsibilities to capture the opportunity of incorporating Dennis' appraisal and field inspection skills and expertise to create a broader 'real estate specialist' role for the Land Board." (Respondent's Exhibit 18.2.)

23. Mark Davis rated DeVore the highest of the three applicants on the briefing papers and on the oral interview. The candidates were rated about equally on the written questions and answers. (Respondent's Exhibit 19.) Davis felt that all three should have done better on the written exam.

24. John Wilkes found the written answers satisfactory for all three applicants but ranked Devore number one based on the creativity of his responses. On both the oral and written portions of the exam he ranked Devore first, Clift second and Bodaghi third. As a commissioner, Wilkes had seen Bodaghi make hundreds of presentations before the Board of Land Commissioners. Bodaghi's presentations were always well done and demonstrated a high level of thoughtfulness. Wilkes had concurred in Bodaghi being named Employee of the Year.

25. Vezzani concluded that Devore was the most qualified candidate and the best person for the job. The appointment was solely his decision.

26. By memo dated February 24, 1993, Vezzani informed Ahmad Bodaghi that Dennis DeVore had been selected to fill the Program Administrator I position effective March 1, 1993 because, "Dennis can best provide the leadership necessary in this position to enhance the position of state trust lands now and in the future." (Respondent's Exhibit 21.)

27. A day or two after Bodaghi received the selection memo, Vezzani told him that he was the best technician he had ever had and there would be no problem

with him staying at the lower level [Grade 87], but not at the higher level [Grade 95]. Vezzani admitted that the only difference was the grade level. Bodaghi was left with the impression that Vezzani simply could not accept him at the higher level.

28. DeVore's DNR position in Greeley was abolished upon his acceptance of the position in Denver. Before hiring Brejcha, Vezzani had talked to DeVore about filling a Land Board position, but DeVore wanted to continue working in Greeley at that time.

29. One of the factors considered by Vezzani in selecting DeVore was DeVore's experience as a real estate appraiser. Real estate appraisal was not among the duties of the position, and appraisal experience was not a requirement listed in the job announcement.

30. The land appraisal duties of the Land Board were performed by the five or six district managers throughout the state. DeVore was one of these district managers. DeVore's duties as a district manager did not include the administration of rights-of-way.

31. The reallocation was based on the actual duties being performed by Ahmad Bodaghi. The only difference was the grade level. The quality of his job performance was high in all areas. His oral and written presentations to the Board of Land Commissioners were commendable. He had, in effect, been the rights-of-way manager for three years. During that time he received ratings of good or commendable on his performance evaluations. The assigned duties of the Program Administrator I position were the same as he had been performing as a Technician II. The appointing authority, the commissioners and co-workers were pleased with his job performance and his willingness to take on more work. Vezzani was "absolutely satisfied" with Bodaghi's performance at the level of Technician II.

32. Vezzani knew that Bodaghi was from the Middle East but did not know

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specifically that he was from the country of Iran.

33. Dennis DeVore, white, is not a member of a protected group.

34. On March 4, 1993, Bodaghi received written notification from the DNR personnel office that his position in the class of Engineering/Physical Sciences Technician II would be abolished and that he would be laid off effective April 30, 1993. (Respondent's Exhibit 22.) On May 1, 1993, Bodaghi exercised his bumping rights to a vacant position by transferring into the position of Engineering/Physical Sciences Technician I-B at the Division of Wildlife. (Respondent's Exhibit 23.) He currently holds the position of Technician II with that agency.

35. Complainant filed a timely appeal, alleging discrimination on the basis of national origin, with the State Personnel Board on March 12, 1993. The matter was then referred to the Colorado Civil Rights Division (CCRD) for investigation. The CCRD issued its Opinion of No Probable Cause on March 14, 1994. Complainant received notice of the CCRD Opinion on April 3, 1994 and filed an appeal thereof the following day.

DISCUSSION

Policy 11-1, 4 Code Colo. Reg. 801-1, provides:

Discrimination Prohibited. Discrimination for or against any person is prohibited, except for bona fide occupational reasons, in recruitment, examination, hiring, classification and compensation, training, promotion, retention, assignment of duties, granting of rights and benefits, or any other personnel action because of race, creed, color, sex (including sexual harassment), sexual orientation, national origin or ancestry,

Complainant bears the initial burden of producing evidence sufficient to establish a prima facie case of discrimination. A prima facie case of employment discrimination is established through the following facts: 1) that

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the applicant belongs to a protected class; 2) that the applicant was qualified for and applied for a position for which the employer was seeking applicants; 3) that the applicant was rejected for the position; 4) that the employer filled the position with an applicant not a member of the protected group. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

If the complainant meets this initial burden, the employer must then rebut the presumption of discrimination by setting forth non-discriminatory justifications for the allegedly discriminatory practice. 411 U.S. at 802. If the employer does so, then the complainant must be afforded the opportunity to carry the ultimate burden of proof, by a preponderance of the evidence, that the employer's asserted business reason for its action is a mere pretext for unlawful discrimination. Id.

This burden of proof framework in employment discrimination cases was summarized in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) in the following manner:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Evidence of pretext may be either direct or indirect (circumstantial). Id. at 256.

Simply proving that the employer's stated reasons for the personnel action are false does not compel a finding in favor of the plaintiff. However, the fact finder's disbelief of the defendant's reasons, together with the elements of a prima facie case, may suffice to infer the ultimate fact of intentional discrimination. No additional proof of discrimination is required. St. Mary's

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Honor Center v. Hicks, 509 U.S. ___, 113 S.Ct. ___, 125 L.Ed.2d 407 (1993).

Complainant established a prima facie case of discrimination by showing that he is Iranian (national origin), he sought and was qualified for the position of Program Administrator I, he was rejected, and Respondent filled the position with a white individual.

Respondent satisfied its burden to put forth a legitimate business reason for not selecting Complainant for the position of Program Administrator I, that is, that Dennis DeVore was the most qualified applicant and the best person for the job now and for the future.

Based on the record made here, it is found that Respondent's reasons are a pretext for discrimination.

One discriminatory act was the decision to, in this instance, institute a rigorous selection procedure totally unlike anything that had been done before at the Land Board under similar circumstances. In the past, where a position was reallocated upward and there was an incumbent, the agency did not interview applicants on the premise that the appointing authority already knew who the most qualified person was -- and it was the person holding the job. This practice was applied to "high level" as well as "low level" positions. (See Finding 14.) There is nothing inherently wrong with an agency changing its selection procedures. But in this case the agency did not just decide to conduct interviews of the three applicants, where a written examination was not required. An appointment could have been made on that basis. Here, the new procedure called for briefing papers, a two-hour written test, as well as a panel interview. This was the first time such extensive procedures had been utilized to fill an occupied position, and in this case the job performance of the incumbent had been applauded by practically everybody.

The conclusion thus reached is that the hiring procedure was implemented for the intended purpose of filling the Administrator position with someone other

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than the incumbent because of the incumbent's national origin.

It is also disturbing that the agency openly sought applicants for this reallocated position, again contrary to past practice. The agency contends that it did the same thing in the case of Scott Price, who is not a member of a protected group. But the situations are different. For one thing, the memo sent to staff members regarding Price's position was not the same, and was not as suggestive, as the one regarding Bodaghi's position. Moreover, Complainant produced evidence that at a staff meeting the appointing authority encouraged applications for Bodaghi's position, but not Price's, even if an interested individual did not feel fully qualified. As it turned out, there were no other applicants for the Price position, and no selection procedure was ever implemented.

One of the reasons given for selecting DeVore instead of Bodaghi was that DeVore possessed appraisal skills, which were not required for the position. This, too, is found to be a pretext. A procedure was already in place for the evaluation of land values by the district managers. The evidence suggests that the agency was specifically looking for reasons to not select Bodaghi, the successfully performing incumbent.

The first hint of discrimination actually occurred when Complainant approached the appointing authority about the open solicitation of applicants for his reallocated position and was told only that he should try to be among the top three applicants if a test were given. The January 29 letter from the DNR personnel office advised Bodaghi that there would not be an examination process if there were fewer than four qualified applicants. The appointing authority's testimony that he "expects even more out of a Program Administrator" belies the fact that Ahmad Bodaghi had a demonstrated history of doing more and more, thus enhancing the duties and responsibilities of his position.

Established facts together with reasonable inferences support Complainant's belief that he was not going to be accepted in a management level position.

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There was nothing wrong with his job performance and no question of his qualifications. The difference was not that the job changed, but that the level changed.

Discrimination can be subtle. Yet subtle discrimination can be the most invidious kind. In the instant case, the discrimination caused a glass ceiling -- an invisible barrier beyond which Complainant could not rise.

After a considered review of the entire record, the administrative law judge concludes that, but for intentional discrimination, Ahmad Bodaghi would have been appointed to the position of Program Administrator I.

Section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) of the State Personnel System Act provides for the recovery of attorney fees and costs upon a finding that the personnel action from which the proceeding arose was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. Given the findings and conclusions contained herein, an award of attorney fees is warranted.

CONCLUSIONS OF LAW

1. Complainant proved by a preponderance of the evidence that he was discriminated against on the basis of national origin when he was not selected to fill the position of Program Administrator I.
2. Complainant is entitled to an award of attorney fees and costs.

ORDER

Complainant shall be appointed to the subject position of Program Administrator I with full back pay and benefits retroactive to March 1, 1993, with the appropriate offset for any salary or other income that would not had been earned by Complainant had he been originally selected to fill the position.

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Complainant shall be paid interest at the statutory rate on the excess, if any, of the amount he would have earned as a Program Administrator I compared to his actual earnings during the applicable time period. Respondent shall pay to Complainant his incurred attorney fees and costs in accord with section 24-50-125.5, C.R.S.

DATED this ____ day of
September, 1994, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of September, 1994, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf
Attorney at Law
1390 Logan Street, Suite 402
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and in the interagency mail, addressed as follows:

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